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STATEMENT OF FACTS

Relator's Petition in Mandamus asserts that Respondent was in error for denying Relator's Motion for Summary Judgment. Yet the Statement of Facts portion of Relator's Brief is only two pages in length, omits substantial relevant evidence, and completely ignores the facts which were presented to Respondent and which contradict Relator's claims that there are no issues as to the material facts. Therefore, Respondent is unable to accept the Statement of Facts which Relator has presented to the Court as being complete. Since Relator has presumably presented all facts which Relator believes support its position, Respondent will supplement the Statement of Facts with those facts which demonstrate why Relator is not entitled to any relief.

Wesley Love, the 37 year old father of three minor children, is lying in the street, unmoving, when a concerned citizen calls the 911 service for the City of Joplin. The good Samaritan speaks with Diana Golden, who is receiving calls at the city's 911 console that evening. He tells Golden that a person is in need of Golden's help:

> Caller: Hi, there's a guy passed out in the middle of the road right by High and Hill over in East town. He's like laying down in the middle of the road and I about hit him.
>
> Joplin 911: Is he in the intersection?

> Caller: No, he's like a half a – he's between uh, High and Michigan. He's on Hill Street and he's like black and laying like in the middle of the road.
>
> Joplin 911: Was he black?
>
> Caller: Yeah. So, I don't – I was just saying –
>
> Joplin 911: Okay, so he's between High and Michigan?
>
> Caller: On Hill Street
>
> Joplin 911: On Hill Street
>
> Caller: In it.
>
> Joplin 911: Okay.
>
> Caller: He's like laying there.
>
> Joplin 911: Alright, we'll have someone check it out
>
> Caller: Alright, thank you.[1]

With the assurance given by Golden that the situation would be checked out, the Samaritan ended the call. This wrongful death suit by the parents and minor children of Wesley Love is brought because Golden breached her promise to the good Samaritan and breached her duty to the

[1] Transcript of 911 call, Tab F2

man that Golden knew was laying helpless in a darkened street. That breach of duty set up a situation where a seventeen year old girl ran over Wesley, fatally injuring him.[2]

The young motorist would not have run over Wesley, but for the breach of duty by Golden. Golden enters into her computer, information which is inaccurate and which is completely contrary to the information that the Samaritan has given her. Golden does not enter into the computer that the unresponsive male is on Hill between High and Michigan. Golden does not enter that the motionless man is to the East of Hill and Michigan, which would have been accurate. Instead, Golden entered that the helpless man in the road was West of Hill and Michigan.

Golden does not request that an officer be dispatched on an urgent or emergency basis. This omission is in contrast to Golden's position in this Court that she was giving "emergency" instructions at the time of her breach of duty. Instead, the request for service is made on a routine basis.

A police officer does happen to be very near the scene when he receives the dispatch to go to the west of Hill and Michigan. That officer, Patrolman Kent Clayton, was driving down Michigan toward Hill when he approached from behind the vehicle being driven by the seventeen year old

[2] First Amended Petition, Tab A; Answer of Separate Defendants Golden

girl, Casey McCalip. As the two cars approached the intersection of Hill and Michigan, McCalip activates her turn signal for a right hand turn. Officer Clayton is not concerned, because his information is that the immobile man laying in the street is to the west, or the officer's left.[3]

Officer Clayton testifies in his deposition that if he had been given the correct information, he would have taken affirmative action to try to stop the McCalip vehicle:

> If I knew that there was possibly a subject in the road to the east and the car was going go like in that direction, I'd probably hit my emergency lights and hopefully they would stop just for obviously for safety's sake.[4]

Officer Clayton also testified that he would use his spotlight to look for the prostrate pedestrian down the side streets.[5] Therefore if Golden gives him the correct information, he would be shining his spotlight to the east of Hill and Michigan, and would illuminate Wesley's form and give greater visual warning to McCalip.

Officer Gary Esson is the accident reconstructionist who receives the call to investigate Wesley's death. He determines that Wesley was laying

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and Boman, Tab B.
[3] Clayton depo., pp. 22 to 25. Tab F6
[4] Clayton depo., p. 37, line 17
[5] Clayton depo., p. 64, line 14

just over 87 feet from Michigan when he was struck by McCalip's vehicle.[6] He also calculates that McCalip could have rounded the corner as fast as 27 miles per hour and still been able to stop in that distance, if she had seen Wesley.[7]

As she drives down Michigan and prepares to make her turn onto Hill, McCalip is well aware that there is a police officer behind her.[8] She is not going over fifteen miles per hour once she turns onto Hill, drives 87 feet and then strikes Wesley.[9] Therefore if Officer Clayton is shining his spotlight east of Michigan, or if he had turns on his emergency lights when he saw McCalip turn east, there is more than enough time and distance for McCalip to stop in time. But Golden has given Clayton the wrong information, and the officer does not realize that the fatal collision is imminent.[10]

Golden herself fully acknowledges the critical need for accuracy in her job:

> Q. By the time that you applied for the job at Joplin though in September of 2000 you already knew how critical it was to be accurate didn't you?
>
> A. Yes.

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[6] Esson depo., p. 23, line 13.
[7] Esson depo., p. 45, line 11
[8] McCalip depo., p. 18
[9] McCalip depo., p. 9
[10] Clayton depo., p. 25

Q. That's something that you knew you were going to have to do if you were going to diligently do your job didn't you?

A. Yes.

Q. And you knew that lives depended on accuracy didn't you?

A. Yes.

Q. And even though you knew that you were willing to accept that responsibility weren't you?

A. Yes.

Q. Because with that job does come responsibility doesn't it?

A. Yes.

* * * * * * * * *

Q. Well, do you have an understanding of what can happen if you're not accurate in getting the information down right?

A. Yes.

Q. What's your understanding of what can happen?

A. I understand that lives could be put in danger, officers could be put in danger.

Q. Both officers and the community, right?

A. Yes.

Q. Community lives, citizen's lives?

A. Uh-huh.

Q. Is that yes?

A. Yes.[11]

Golden accepted her job knowing how critical it was to be accurate. The City of Joplin gave her tools to help her to be accurate:

Q. You had a printed map sitting between you and the next console over from you didn't you?

A. Yes.

Q. A printed map of the city of Joplin, correct?

A. Yes.

Q. You could have looked at that map if you wanted couldn't you?

A. If needed.

Q. You also had a map, computerized map, on your console didn't you?

A. Yes.

Q. There was an icon on your computer you could click on that would bring up a map of the city of Joplin wasn't there?

A. Yes.[12]

[11] Golden depo., pp. 10-11.
[12] Golden depo., pp. 21-22.

Using those available tools would have prevented this catastrophe:

> Q. And if you had done that, if you had clicked on the computer icon and called up the map, or if you had looked at the paper map of the city of Joplin would you have realized the error in your assumption?
>
> A. Yes.[13]

Golden herself admits there is no discretion in whether to accurately record the location that is given to her by the good Samaritan caller:

> Q. Taking down the location of somebody in a 911 call is something about which there isn't any discretion is there? In other words, your job is to take it down accurately isn't it?
>
> A. Yes.
>
> Q. You knew from your training that it was critical to be accurate didn't you?
>
> A. Yes.
>
> Q. Do you accept responsibility in this instance for giving the wrong address to the officer?
>
> A. Yes.[14]

Golden's sworn testimony thus directly contradicts her position in this case.

Golden's supervisor also directly contradicts Golden's position. Paul Luttrell is the Public Safety Communications Manager for the City of Joplin,

[13] Golden depo., p. 23.
[14] Golden depo., p. 24

and has been since 1999.[15] As such, he is Golden's supervisor.[16] During Golden's training period, she receives a review which indicated "Diana needs to make sure all information received from callers gets passed along to field officers to insure their safety. She also has come a long way in learning the city streets, but can still improve on that."[17]

Supervisor Luttrell agrees that Golden violated the written policies and procedures of the City of Joplin when she indicated that the disabled man in the street was "to the west" of the intersection of Michigan and Hill.[18] That written policies and procedures manual is used to tell the employees in the communications department how to do their work.[19]

An under of APCO is also important. APCO is the Association of Public-Safety Communications Officials. Supervisor Luttrell is APCO certified.[20] The city sends Golden to receive APCO training in St. Louis.[21] And the State of Missouri mandates that Golden receives training and testing that is compatible with APCO requirements.[22] The job requirement to

[15] Luttrell depo., p. 9.
[16] Luttrell depo., p. 17.
[17] Luttrell depo., p. 20.
[18] Luttrell depo., p. 51.
[19] Luttrell depo., p. 33.
[20] Luttrell depo., pp. 10-11.
[21] Luttrell depo., p. 37.
[22] Luttrell depo., p. 31.

follow APCO standards is especially important because they are both industry standards and job requirements.

Plaintiffs' expert on this subject is Sue Pivetta. She has a nationwide consulting and training service, which is certified by the State of Missouri to provide portions of the dispatcher's training.[23] Ms. Pivetta confirms that the telecommunicator (the title of the position Golden holds) has "no discretion in regards to his or her obligation to accurately record and transmit the information which the caller provided." Ms. Pivetta also makes clear that Golden violated specific portions of Joplin's Policies and Procedures Manual in several regards.

Ms. Pivetta also expresses the opinion that the conduct of Golden constitutes gross negligence. The opinion of gross negligence is based upon specific facts and upon a legal standard or definition of gross negligence which Ms. Pivetta sets out in a two page letter that accompanies her affidavit. Thus there is substantial detailed evidence as well as expert opinion testimony, that Golden is grossly negligent in her conduct in this case.

Other facts will be brought to the Court's attention in the Argument portion of this Brief as are appropriate.

Points Relied On

Point I

Relator is not entitled to an order in prohibition against Respondent, because Relator is subject to suit for her negligence in that she is not a public official, is not entitled to official immunity, and in any event is guilty of violating the ministerial duty of accurately recording and communicating the location of Wesley Love.

Principal authorities relied on

State ex rel. Howenstein v. Roper, 2005 W.L. 351374 (Mo. banc February 15, 2005).

Jungerman v. City of Raytown, 925 S.W.2d 202, 206 (Mo. banc 1996).

Point II

Relator is not entitled to an order in prohibition against Respondent, because Relator owed a duty of care to Wesley Love in that once Relator received the call that (the man later identified as) Wesley Love was laying motionless in the street, and Relator assured the caller that help would be sent, Relator's duty was to Wesley Love in particular and not to the public in general.

Principal authorities relied on

Larabee v. City of Kansas City, 697 S.W.2d 177 (Mo. App. 1985)

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[23] All information regarding the opinions and qualifications of Sue Pivetta

Geiger v. Bowersox, 974 S.W.2d 513 (Mo. App. 1998)

DeLong v. County of Erie, 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983)

Point III

Relator is not entitled to an order in prohibition against Respondent, because Relator does not come within the qualified protection of § 190.307, RSMo. in that Relator was employed by the City of Joplin, Missouri, which did not operate under Chapter 190. Further even if the statute were applicable, Relator is guilty of gross negligence as more fully set forth in the response to the summary judgment motion which was presented to Respondent, and the statute affords Relator no protection for her gross negligence.

Principal authorities relied on

State ex rel. Pulliam v. Reine, 108 S.W.3d 148, 160 (Mo. App. 2003).

Ladish v. Gordon, 879 S.W.2d 623 (Mo. App. 1994)

McGuckin v. City of St. Louis, 910 S.W.2d 842 (Mo. App. 1995).

Point IV

Relator is not entitled to an order in prohibition against Respondent, because Relator failed in her burden to demonstrate that there were no issues of

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are contained in her affidavit.

material fact as to those matters raised in the motion for summary judgment and therefore Respondent had no discretion except to deny the motion, in that even where public duty and official immunity are claimed the plaintiff is entitled to have a jury decide any contested factual issues which must be established in support of those qualified privileges.

Principal authorities relied on

State ex rel. Leonardi v. Sherry, 137 S.W.3d 462 (Mo. banc 2004).

Anderson v. Jones, 902 S.W.2d 889 (Mo. App. 1995)

Lynn v. Time-D.C. Inc., 710 S.W.2d 359 (Mo. App. 1986),

ARGUMENT

Issue Summary

The real issue in this case is that Golden contributed to cause the death of plaintiffs' son and father, in the discharge of a non-discretionary duty, while working at a city-owned 911 system that is outside of the protection of § 190.307, RSMo. She did this in direct violation of the requirements of her job. She did this in response to a request for aid for a particularly identified man who needed assistance, not as part of a duty to the public at large. She did this as a result of her own gross negligence by which she violated the simplest of ministerial duties.

Relator's Issue Summary also misstates the facts in that it assumes that Golden was performing a discretionary act when she was told the correct location of the pedestrian who was in need, but communicated the wrong address to the police dispatcher. This misstates Golden's own evidence, as well as the testimony of her supervisor and the opinions of plaintiffs' expert witness, and there is no credible evidence to the contrary.

Argument

Point I

Relator is not entitled to an order in prohibition against Respondent, because Relator is subject to suit for her negligence in that she is not a public official, is not entitled to official immunity, and in any event is guilty of violating the ministerial duty of accurately recording and communicating the location of Wesley Love.

Relator's brief makes the primitive error of assuming without proof that Golden is entitled to official immunity simply because she is a public employee. The cases cited by Relator do not stand for the propositions asserted, and being a governmental employee does not automatically bring a person within the qualified privilege afforded to government officials. Since Relator does not claim that she is entitled to official immunity other than through her naked status as a "mere employee," then it is clear that there is basis for Golden to claim the privilege which she seeks. Thus, Golden is in fact liable for her negligence which contributed to cause the death of Wesley Love.

Relator states "Official immunity protects 'mere employees'" and cites as authority *State ex rel. Missouri Dept. of Agriculture v. McHenry,* 687 S.W.2d 178

at 183 (Mo. banc 1985). But the court did not say that "mere employees are public officials that are entitled to immunity.

In *McHenry*, the plaintiff sued several agencies and their heads. Among the defendants was one Tommy Hopkins, who was the Director of the Missouri Division of Grain Inspection, Weighing, and Warehousing. Hopkins asserted the qualified privilege of official immunity. The plaintiff countered that as Director of the Missouri Division of Grain Inspection, Weighing and Warehousing, Hopkins was simply a "mere employee" who was not entitled to official immunity. The court rejected the plaintiff's claim, and held that the Director was not a "mere employee."

McHenry did not hold that a "mere employee" was entitled to official immunity. The court instead held that the Director was not a "mere employee" and therefore was entitled to a qualified privilege for discretionary acts.

Relator also cites *Green v. Denison*, 738 S.W.2d 861, 865 (Mo. banc 1987) for the statement that "we reject any suggestions that only higher officials possess the discretion or judgment so as to enjoy the protection of official immunity." While Relator does at least accurately recite the quoted language, the case does not hold that all governmental employees are to be considered as public officials.

Contrary to Golden's assertion, there continues to be a distinction between a public official and a mere public employee:

> A public office is the right, authority and duty, created and conferred by law, by which an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer. Whether or not a public employee is a public officer is dependent upon the legal and factual circumstances involved.

State ex rel. Howenstein v. Roper, 2005 W.L. 351374 (Mo. banc February 15, 2005). Relator's position that a "mere employee" is automatically entitled to qualified immunity as a public officer is not, and never has been the law.

Relator holds an entry-level job in the communications department. There are three job levels in that department. Public Safety Communications Manager, Public Safety Communications Supervisor, and Public Safety Communications Operator. Golden is an operator. Her job description is set out at page 12 of the Communications Department Policies and Procedures Manual. The job entails no supervisory or discretionary functions. Indeed, the job description begins with the statement that it is the operator who will work under general supervision. This entry level job does not entail the exercise of some portion of the sovereign's authority.

Relator's brief does correctly define a ministerial act as one which is of a clerical nature. What could be more clerical than being told the correct address, and having to enter that information correctly into the computer? That is the most basic function of the lowest level of data entry.

And what is the source of Relator's contention that Golden was not engaged in a ministerial function? Certainly not from an analysis of either the facts or the law. Relator simply relies upon the claim that plaintiff below must "overcome" official immunity. Yet Relator cites no case that there is a presumption that an entry level job that requires only a high school education to fill, is entitled of official immunity. There is also no presumption that the acts of such a person, in inaccurately entering the wrong address, is somehow a discretionary act.

Relator does not discuss the implications of the rule she proposes. Does this Court truly wish to hold that a communications officer does not have the duty to accurately record addresses? How can the police reasonably rely upon the address of a reported crime-in-progress, if the operator has no duty to accurately record the address? What right would the police have to make a warrantless entry if the operator is free to change the address where a hostage is being held, or a meth lab is being operated in the presence of a child? What privilege would fire and ambulance personnel

have to drive in an emergency fashion, if they had no right to rely upon the report given them by the operator?

Golden received the correct address. She was not misled by the caller, or by the situation. The mistake was solely of her own making. And the mistake was in direct violation of her job responsibilities.

The Communications Department's Policies and Procedures Manual mandates that an operator: must assure "Accuracy: Obtain specific information. NEVER ASSUME !!" (p. 25); have "knowledge of names and locations of streets in the City of Joplin" (p. 12); and will "not depart from established policy or procedure without approval from an appropriate supervisor." (p. 4).

The training which the city required Golden to obtain, buttresses the mandates of the policies and procedures manual. The manual itself requires a newly hired employee like Golden to successfully complete the APCO telecommunications course (p.14). The city in fact sent Golden to St. Louis for APCO training.

The APCO training manual (Ex. 49) instructs the trainee operator that "When a call is received and information is gathered, the police officers in the field make decisions based in part on the information that is provided by the communications center. Accurate and complete information gathered

and relayed to the dispatcher by the calltaker can make the difference between good and bad decisions in the field." (p. 148).

APCO Project 33 (Tab M1) defines training standards. It acknowledges that NFPA 1061 identifies the skills and abilities that persons such as Golden need. Project 33 confirms that the committee "is supportive of the recommendations of NFPA 1061.

NFPA of course stands for the National Fire Protection Association. Its standard 1061 (Tab M2) includes requirements for the entry level position of Public Safety Communicator I. Standard 4.2.3 states that the operator must "Extract pertinent information, given a request for public service, so that accurate information regarding the request is obtained." Standard 4.4.3 requires the operator to "Relay information to other telecommunications personnel or entities, given processed data so that accurate information regarding the request for service is provided."

As is more fully set out in the statement of facts, both Golden and her supervisor admitted that Golden was required to transmit accurate information to the radio dispatcher. Golden herself admitted that she had no discretion in that regard.

This is as simple, as basic, and as clear cut a case of ministerial duty as one could imagine. Golden possesses no discretion to do anything other

than pass on information in an accurate manner. It is basic data entry. The policies and procedures manual states that she can only deviate from her job requirements with the consent of a supervisor, which did not occur here.

Golden was charged with the simple task of passing on accurate information, and she failed. She violated the most elementary tasks of her job, and she is liable for the consequences. "The fact that written procedures cannot anticipate every circumstance does not transform a ministerial activity into a discretionary function." *Jungerman v. City of Raytown,* 925 S.W.2d 202, 206 (Mo. banc 1996). The policies and procedures manual, the training manual, and the industry standards, all clearly and unequivocally direct the Golden must accurately obtain and pass on information. Golden was given the right location, her only job was to do it correctly. But she did not. And as a result, Wesley Love died. For this, the law requires Golden to answer in a civil suit.

Point II

Relator is not entitled to an order in prohibition against Respondent, because Relator owed a duty of care to Wesley Love in that (the man later identified as) Wesley Love was laying motionless in the street, and Relator assured the caller that help would be sent, Relator's duty was to Wesley Love in particular and not to the public in general.

The facts are that as Wesley Love lays immobile and helpless in the street, the good Samaritan is worried about the man he sees who is in danger. The Samaritan calls 911 out of concern for this man. The caller has almost ran over Wesley and he does not want someone else to run over the man.

Most importantly, Golden tells the caller "Alright, we'll have someone check it out." This is what the caller wants, as is shown by this response of "Alright, thank you." Having been assured by Golden that someone will be sent to check out the problem with the man who is prostrate in the street, the Samaritan hangs up and goes on about his business.

Under these facts, Golden clearly owes a duty to Wesley Love.

That Golden owed a particularized duty to Wesley is shown by Relator's cited case of *Green v. Denison,* 738 S.W.2d 861 (Mo. banc 1987).

In that case, this court said "We do not disagree with the proposition that public officials may be required to exercise care to avoid injury to particular individuals, when the injury is reasonably foreseeable and is not an integral part of the officers' action in the line of discretionary duty." (*Id.* At 866). Examples which the court relied upon for this proposition include *Larabee v. City of Kansas City*, 697 S.W.2d 177 (Mo. App. 1985), which held a building inspector liable for harm caused by knocking down a wall at the direction of a fire fighting officer; and *State ex rel. Eli Lilly & Co. v. Gaertner*, 619 S.W.2d 761 (Mo.App. 1981), holding a physician in public employment still owes his patients the duty of exercising due care.

In *Stacy v. Truman Medical Center*, 836 S.W.2d 911 (Mo. banc 1992), a fire broke out in defendant's hospital and a patient died. The defendant claimed that its duty to prevent fires, and its duty in the event of a fire, flowed to the public in general therefore defendant was entitled to immunity under the public duty doctrine. This court found that "the cases that have utilized the public duty doctrine involve situations where there is clearly no duty owed to a particular individual." (*Id.* At 921). It was concluded that the hospital owed a duty to all of its patients, but this did not make the duty one which was owed to the public in general. Therefore, the defendant was not entitled to immunity.

Gieger v. Bowersox, 974 S.W.2d 513 (Mo. App. 1998) arose from a poisoning of a prison inmate by way of substitution of the contents of a medicine bottle. The prison nurse had the duty to ensure that only proper persons had access to the medicine bottles. The court rejected the nurse's claim of protection under the official immunity and public duty doctrines, holding that the nurse's "failure to follow prison policy regarding the administration and maintenance of prescriptions did not affect the general public, but only Mr. Geiger who had a special, direct, and distinctive interest in [the nurse's} performance of her ministerial duties." (*Id.* At 517).

Brown v. Tate, 888 S.W.2d 413 (Mo. App. 1994), involved an intersectional collision with a police officer. The defendant claimed immunity under the public policy duty doctrine. The court found that this defense did not apply: "The kind of duty owed to the public at large, and not to the individual injured, is the same kind of duty as that which gives official immunity, namely, a duty which calls for the public employee's or public official's professional expertise, training and judgment." (*Id.* At 416).

The court further observed that "in the case of a public official, rarely if ever will the public duty doctrine provide a shield from liability where the official immunity doctrine would not. The two doctrines merge; they produce the same result." *Brown* at 416.

In a case such as the one presently before the court, there is no distinction between the claimed defenses of official immunity and public duty. Golden had no discretion in whether to accurately pass on to the dispatcher the correct address. There being no discretion in the matter, Golden's conduct also did not violate a public duty as that term is defined in the law. *Davis-Bey v. Missouri Department of Correction*, 944 S.W.2d 294 (Mo. App. 1997) is a prime example of this distinction.

In that case, a prison bus driver was transporting the plaintiff when the bus rear-ended another car. The defendants claimed that the bus driver owed a duty to the traveling public at large, and therefore was only guilty of violating a public duty for which there was no liability to the prisoner. The court provided a clear definition of what was required in order for the public duty doctrine to apply: "The kind of duty owed to the public at large, rather than the individual injured, is the kind that requires the public official to use his professional expertise, training and judgment; it is not sufficient that the public official be acting within the scope of his employment." *Davis-Bey* at 298.

In other words, if the public employee is performing a ministerial task then the employee does not come within the protection of the public duty doctrine. Since Golden by sworn testimony admits to violating a ministerial

duty about which she has no discretion, she did not violate a public duty. Under the law, Golden violated a duty to the person whom she knew was laying helpless in the street. Golden violated a specific duty after having told the caller that she would in fact send someone to check out the man. Under existing Missouri law, Golden is liable to plaintiffs for her contribution to the death of plaintiffs' son and father.

Other states also find liability for negligence by a 911 operator. The case of *DeLong v. County of Erie,* 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983) found liability for the negligence of a 911 operator who sent police to the wrong address. The caller correctly told the operator "Police, please come 319 Victoria right away. . . .I heard a burglar; I was his face. . . ." The operator, however, "erroneously reported the address as 219 Victoria, and mistakenly assumed that the call had originated in Buffalo because he knew there was a Victoria Avenue in the city."

There was a burglar at 319 Victoria in Kenmore, a village adjacent to Buffalo. The burglar stabbed and killed the resident there. On appeal, the court first observed that "This, of course, is not a case in which there was no contact between the victim and the municipality prior to her death. The plaintiff is not seeking to hold the defendants liable as insurers for failing to protect a member of the general public from a criminal act of which they

were not aware but should have anticipated and prevented." (*DeLong*, 60 N.Y.2d at 304). Rejecting the defense that there was no liability under the public duty doctrine, the judgment in favor of the plaintiff was affirmed.

Other cases finding liability for negligence in providing 911 or similar services include *Hutcherson v. City of Phoenix*, 961 P.2d 449 (Ariz. 1998); *Chambers-Castanes v. King County*, 100 Wash.2d 275, 669 P.2d 451 (1983); and *City of Kotzebue v. McLean*, 702 P.2d 1309 (Al. 1985).

Respondent has located one judicial decision which involves a call from a good Samaritan who saw an injured pedestrian. While it is the decision of a trial court, it is well reasoned and looks to the law in sister states as well. That case is *Meeks v. Broschinski*, 63 Va. Cir. 150, 2003 WL 22415285 (2003).

In *Meeks* a citizen called the 911 service, advising of a hit and run victim in the road. The service did not respond appropriately and the man died. Against the argument that defendant was shielded by the public duty doctrine, the trial court first observed that the pedestrian "was not part of the general public, rather he was a person in need of emergency services and thus a member of [a special class]." *Meeks* at 1. The opinion went on to easily distinguish the holding in *Muthukamarana v. Montgomery County, Maryland*, 370 Md. 441, 805 A.2d 372 (2202), by observing that the

dispatchers there "followed appropriate protocol in handling the incoming calls." This is in distinction to Golden, who clearly violated the city's policies and procedures, and the applicable industry codes in which she had been trained.

The *Meeks* opinion also distinguished police officers from dispatchers. The former have both responsive and affirmative duties, while the latter only have to react as calls come in by telephone. Once a call is received, the dispatcher serves a distinguishable member of a particular class, while police officers serve the public in general. The trial judge concluded that 911 operators should not receive blanket immunity no matter the circumstances, and that the public duty doctrine was not applicable where a passerby calls 911 to report a pedestrian in need of services.

Some courts have found liability based upon a public employee's promise to send help, or to give a warning to affected persons. For example in *Brown v. MacPherson's Inc.*, 86 Wash.2d 293, 545 P.2d 13 (1975), a state employee gave a concerned person the impression that the employee would give an avalanche warning to endangered homeowners. The court held that "one who undertakes, albeit gratuitously, to render aid to or warn a person in danger is required by law to exercise reasonable care in his efforts, however

commendable." (*Id*. 86 Wash.2d at 299). A cause of action was ruled to exist against the public employee.

This case is mentioned because Golden assured the good Samaritan who called, that someone would be sent to check out the pedestrian. But she did not send anyone to the correctly identified location. Golden did not just receive a call about Wesley Love. She promised to respond to that call by sending help. This is sufficient to create a duty to a particular person, Wesley Love, even if Golden were not a 911 employee. There is simply no reasonable basis for concluding that Golden's breach of duty was based upon a failure of discretion to act on behalf of the public in general.

Relator's Point II is simply an opportunity to restate the same baseless claim of immunity which was also unsupportable under Point I. The primary basis for this conclusion is that the public duty doctrine does not apply where an employee violates only ministerial duties. An equally strong reason for rejecting Relator's claim is that Wesley Love was in fact an identifiable person who was unable to help himself but was in need of rapid assistance. As a clearly identified person, Golden's duty was to him and not just to the public in general. Relator's Point II has no merit.

Point III

Relator is not entitled to an order in prohibition against Respondent, because Relator does not come within the qualified protection of § 190.307, RSMo. in that Relator was employed by the City of Joplin, Missouri, which did not operate under Chapter 190. Further even if the statute were applicable, Relator is guilty of gross negligence as more fully set forth in the response to the summary judgment motion which was presented to Respondent, and the statute affords Relator no protection for her gross negligence.

Relator resorts to the use of "pretzel logic" to conclude that Golden comes under § 190.307, RSMo. To see if the statute is applicable, it is first necessary to untwist the pretzel.

Golden is employed solely by the City of Joplin. Relator makes absolutely no claim that the City of Joplin formed a 911 system pursuant to Chapter 190, sections 300 through 340 inclusive. Only 911 systems formed under those statutes are entitled to any protection under § 190.307.

What Relator does to twist the statute is to say that § 190.300(6) defines a public agency as including a city that provides certain services. That much is correct. Relator then makes the leap that because Joplin is a public agency, it's employees must come within the qualified protection of §

190.307. But the latter statute only applies to 911 systems expressly created by a vote of the public and which requires a special tax. Relator nowhere claims that its 911 system directly comes within that statutory scheme, and has never presented evidence to support such a conclusion.

Relator next tries to claim protection by reason of the existence of the Jasper County Emergency Services Dispatch Board. It is correct that Jasper County did form a 911 dispatch board with a vote of the citizens and approval of a sales tax for that purpose. Even after approval of that sales tax, the City of Joplin wanted to continue its own 911 call service:

> Q. We have a county-wide 911 service in Jasper County, right?
>
> A. Yes.
>
> Q. But Joplin fields its own 911 calls?
>
> A. Correct.
>
> Q. Has that been true for as long as Joplin had had a 911 service?
>
> A. Yes.
>
> Q. Did Joplin have a 911 service before Jasper County did?
>
> A. Yes.

Deposition of Greg Boman, p. 12. When the county formed a 911 service, it was originally going to place the call center in Joplin. However, the city

chose to maintain its own call center. There is no oversight of the Joplin call center by the Jasper County dispatch board:

> Q. In the evening hours or night hours does the county still operate its call center?
>
> A. The county operates 24 hours a day so does the City of Joplin. We are separate. We don't impact or interfere with each others ability to operate. When they – if they were to send personnel to our center, they would be under our auspices. If we – vice versa, same thing.

Deposition of Paul Luttrell, p. 13. Mr. Luttrell also identified that the relationship between the city and county 911 centers was that "if they (Jasper County) were to go down, all of their equipment, transfers would come to us and vice versa. And for that, they remunerate the City a specified amount to do and to act in that roll as backup to Jasper County." (p. 13).

In the event of a failure in equipment or communication, the county and city 911 centers would back each other up. Beyond that, there is no relationship between Jasper County and the City of Joplin in this context. That does not convert the city's 911 service into one which is covered by Chapter 190. That does not convert Golden into an employee of Jasper County's 911 service.

The separation between the City of Joplin and the Jasper County Emergency Services Dispatch Board is further demonstrated by paragraph 9 of the Agreement upon which Golden relies. It provides that "This Agreement contemplates that both 'JCESD' and 'City' will [act] independently of each other, operate, staff, and respond to, E-911 service requests, without control of the other."

The City of Joplin is situated in two counties, Jasper and Newton. It would not be proper for the taxpaying citizens of one county to fund operations in another county. Yet this is what Relator claims, contrary to the written Agreement, the testimony of the head of Joplin communications, reason, and the law.

Having untangled that argument, it is clear that Golden does not come within the limited protection of § 190.307. Even if she did, however, there is more than sufficient evidence to create a jury question of Golden's gross negligence.

It is the law of this State that there are no degrees of negligence. *Fowler v. Park Corporation,* 673 S.W.2d 749 (Mo. banc 1984). That has not kept the legislature from using that term, however, so the courts have had to fashion some form of definition.

"The term 'gross negligence' has been held to connote an improper conduct greater either in kind or in degree or both than ordinary negligence." *State ex rel. Pulliam v. Reine*, 108 S.W.3d 148, 160 (Mo. App. 2003). Gross negligence is still negligence. Had the legislature meant to apply higher standards such as willful and wanton, or some similar existing standard, they could and would have done so.

There is certainly no authority for the proposition that gross negligence is any less a jury question than is simple negligence. Yes, the jury must be instructed as to the proper standard, but if reasonable minds could differ then this like all other fact questions is for the jury to resolve.

The evidence of Golden's gross negligence is overwhelming in this case. Golden was fully cognizant and aware that if she gave the dispatcher the wrong address, the lives and safety of officers and citizens was fully at risk. She was made aware that the unconscious Wesley Love was lying in the middle of the street, that it was dark, and that one car had barely avoided running over Wesley. Golden had been warned on her evaluations that she needed to pass on accurate information to the officers in the field, and that she had a deficit in her knowledge of the city's streets.

The city had done what it could. It provided Golden with APCO training, in which she learned the industry standards and practices. Golden

was taught how critical it was to obtain an accurate address, and to pass that address on to the officers with the same level of accuracy. The city also gave Golden written policies and procedures, which she violated. The city went so far as to provide two types of maps, one printed and one electronic, so that Golden could easily locate and verify any address.

Golden chose to ignore her training, her written job description, the city's policies and procedures, and the accurate information the caller had given to her. In its place she substituted her incomplete assumptions based upon what she knew to be incomplete knowledge of the city in which she herself did not live. The jury will be quite within its province to determine that Golden knowingly substituted her inaccurate assumptions solely to save herself the few seconds that would have been required to look at either of the maps. Weighing her slight inconvenience against loss of the life of Wesley Love, certainly will permit a finding of gross negligence.

An actor's degree of duty can be increased when it is known that the person to whom the duty it owed, is incapacitated. *Daniels v. Senior Care, Inc.*, 21 S.W.3d 133, 137 (Mo. App. 2000). Golden had actual knowledge that Wesley Love was incapacitated in the street, unable to help himself, and that his safety was highly dependant upon her fulfilling her duty to give the officers Wesley's correct location. The next driver on darkened Hill Street

could very well not see or react as quickly as had the 911 caller, and that would mean serious injury or death to Wesley.

Relator also raises the issue that the opinion of plaintiffs' expert, Sue Pivetta, is entitled to no weight on the question of whether Golden was guilty of gross negligence. Relator's position is not well founded.

Relator relies upon an instance where an expert witness simply opined that a defendant was grossly negligent. It does not appear that the expert ever identified the standard he was using in finding gross negligence. Respondent would agree that such an opinion, unsupported by either fact or legal definition, would be of slight use. But that is not the case here.

Sue Pivetta has given her seven page affidavit in this case (Ex. H4). Those seven pages set out fully the factual basis for her opinion. Attached to that affidavit is a two page letter which she incorporates into her affidavit. That letter sets out the legal standard for gross negligence upon which she bases her opinion.

Ladish v. Gordon, 879 S.W.2d 623 (Mo. App. 1994) instructs on the proper method of presenting expert opinion testimony of negligence. The court held that it was perfectly proper for an expert to state that a defendant was negligent, but only if it is first made clear that the expert is using the proper legal standard. That requirement is complied with in this case, as is

shown by Ms. Pivetta's letter demonstrating that her understanding of "gross negligence" is based upon Missouri law. Thus, Ms. Pivetta's opinion is substantial evidence that Golden's conduct was grossly negligent.

For the sake of completeness, Respondent does need to address the issue of statutory construction concerning §190.307. What is and is not an "emergency" under that statute is not defined. We know that Golden did not dispatch the police in an emergency condition, as the responding officer did not even have his emergency lights lit. The 911 transcript likewise shows that the police were dispatched in a routine fashion.

A police officer who drives without activating lights and siren, is not entitled to the protection which the law affords to vehicles responding to an emergency. *McGuckin v. City of St. Louis,* 910 S.W.2d 842 (Mo. App. 1995). It is reasonable that a similar standard should apply here. If Golden herself did not treat the situation as an emergency, how can she now claim the right to assert a qualified privilege based upon the giving of "emergency instructions?" Golden's position is simply not rational.

Another issue is whether the statute is a limitation on existing liability, or the creation of a new cause of action. The entire statute must be given meaning and effect if possible. *State v. Blocker,* 133 S.W.3d 502 (Mo. banc 2004). The statute's requirement that the operator be guilty of gross

negligence, would have little meaning if the operator was not subject to suit in the event there was gross negligence. Golden's suggested interpretation would render much of the statute meaningless.

It has already been shown that Golden is not entitled to official immunity, or to immunity under the public duty doctrine. It has also been shown that Golden has failed to prove that § 190.307 is applicable to plaintiffs' claims against her. In fact Golden did not plead the statute as an affirmative defense, and it is even questionable whether she is entitled to assert that claim at this time. *Robinson v. Cameron,* 118 S.W.3d 638 (Mo. App. 2003).

Even if the court were to conclude that § 190.307 applied here, Golden's conduct still raises a jury question as to gross negligence. For Golden to abandon her training and the written policies of her job, and to fail to perform the most basic yet most important part of her job, when death is almost certainly the result, is gross negligence. The concept and the conclusion are both plain and simple.

Point IV

Relator is not entitled to an order in prohibition against Respondent, because Relator failed in her burden to demonstrate that there were no issues of material fact as to those matters raised in the motion for summary judgment and therefore Respondent had no discretion except to deny the motion, in that even where public duty and official immunity are claimed the plaintiff is entitled to have a jury decide any contested factual issues which must be established in support of those qualified privileges.

Plaintiffs are entitled to have a jury decide all factual issues upon their legal claims, no matter what other issues exist in the case. *State ex rel. Leonardi v. Sherry*, 137 S.W.3d 462 (Mo. banc 2004).

Even when a defendant claims official immunity, plaintiffs are entitled to a jury trial when there are factual issues in dispute. For example in *Anderson v. Jones*, 902 S.W.2d 889 (Mo. App. 1995), the defendant police officer claimed that he was entitled to official immunity because his emergency lights were on. The trial court granted summary judgment, but this was reversed upon appeal as there was a factual issue whether the officer was actually responding to an emergency.

In *Lynn v. Time-D.C. Inc.*, 710 S.W.2d 359 (Mo. App. 1986), the trial court sustained defendant's motion to dismiss based upon official immunity. On appeal the court reversed, indicating that there must be a factual basis for a court to determine whether official immunity applies. In particular, the court ruled that "the record, however, is devoid of any evidence to support a finding that the functions performed were either ministerial or discretionary." (*Id*. At 361).

Relator is required to do more than plead that she was entitled to some form of immunity for her gross negligence. She is required to do more than simply produce some evidence from which the conclusion might be reached that her gross negligence is not actionable. To prevail upon a motion for summary judgment, Relator is required to prove that there were no issues of material fact pertaining to the ultimate fact of whether she could recklessly give the police with wrong addresses with impunity, and that she was entitled to judgment as a matter of law. *Deatherage v. Cleghorn*, 1115 S.W.3d 447, 455 (Mo. App. 2003). This, Relator has wholly failed to do.

Upon the basis of the record which Relator has presented, Respondent had no discretion except to deny the motion for summary judgment.

Relator is not entitled to judgment as a matter of law, has not demonstrated the absence of legitimate issues of material facts, and has

failed to demonstrate any basis for any issuance of this Court's permanent Writ of Prohibition.

Conclusion

What is most important about this case might be what it is not about. It is not about a 911 operator giving emergency instructions to a five year old caller whose mother just fell to the floor and turned blue. It is not about discretion, as even Golden herself admits under oath that she had no discretion in whether to transmit the address she had been correctly provided. It is about § 190.307, in that the City of Joplin operated its 911 call center independent of the statutorily created Jasper County Board. It is not about public policy, in that it must be the policy of this State that 911 operators be relied upon to accurately perform the ministerial task of passing on information they have been accurately provided. The functioning of law enforcement requires this.

What this case is about, is accepting personal responsibility for giving the wrong address to police officers, when the operator knows that a life is in immediate jeopardy if the correct address is not given. This simple, clerical, ministerial task is all that was required of Golden. Yet Golden failed this most elementary of tasks, under circumstances which evidence gross negligence. Relator's position in this matter is unreasonable and unsupported, and is not a valid basis for this Court exercising the

extraordinary power of Prohibition. The Preliminary Writ should be withdrawn.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one paper copy of Respondent's Brief, and one electronic copy on disk, were served upon the persons listed below via U.S. Mail, postage prepaid, this 9th day of March, 2005:

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CERTIFICATE UNDER RULE 84.06 (c) & (g)

The undersigned hereby certifies that the Respondent's Brief complies with the limitations contained in Rule 84.06(b), and that the Respondent's Brief contains 10,006 words. The undersigned further certifies that the computer disk filed herewith has been scanned for viruses and is virus free.

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_____

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